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No. 94-1910

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, AND VOLKSWAGEN OF AMERICA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169), expressly preempts a state common law standard that conflicts with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

RULE 29.1 STATEMENT

Respondent Volkswagen AG (sued as Volkswagenwerk AG (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Comercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.
Volkswagen Bruxelles S.A.

Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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VOLKSWAGENWERK AG, AND VOLKSWAGEN OF AMERICA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of a single question (Pet. i): whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[1] expressly preempts state common law tort claims that conflict with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208. This is purely an academic question, however, because its resolution will not have any effect on the outcome of this case. The Wisconsin Court of Appeals held that petitioner's tort claims were both expressly *and impliedly* preempted by the Safety Act, and petitioner has now waived the implied preemption issue by

[1] For ease of reference we refer to the prior codification of the Safety Act, which is cited in the petition and in the opinion of the court below.

not presenting it in her certiorari petition. Furthermore, preemption aside, the jury found that the restraint system in petitioner's car was *not* defectively designed and returned a verdict for the Volkswagen defendants (hereinafter Volkswagen or VW).

In any event, the court below correctly resolved the express preemption issue, and petitioner is plainly wrong in asserting that this ruling "is in conflict with the decisions of all of the federal courts of appeal which have considered the issue." Pet. 13. In fact, the cases petitioner relies on were decided prior to this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), and the post-*Cipollone* decisions strongly support the decision below. In sum, there is no reason to grant the petition in this case.

STATEMENT

A. The Safety Act and FMVSS 208

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Another provision of the Act added a so-called "savings" clause, which provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess. 4, 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Conf. Rep. No. 1776, 89th Cong., 2d Sess 17 (1966). As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

In exercising the Department of Transportation's authority under the Safety Act, the National Highway Traffic Safety Administration (NHTSA) has promulgated numerous standards dealing with vehicle design and performance. At issue in this case is FMVSS 208, which addresses the "requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1. In particular, for passenger cars manufactured between September 1, 1973 and

September 1, 1986, FMVSS 208 provided three designated design "options" for safety restraint systems and performance requirements for each:

1. Complete passive protection for all crashes (S4.1.2.1);

2. Passive restraints for head-on crashes (S4.1.2.2); or

3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave a manufacturer the right to choose any one of these three design options for its vehicles.

The second option available under FMVSS 208 protected vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[2]

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[2] The second design option in FMVSS 208 for passenger cars manufactured between September 1, 1973 and September 1, 1986 read in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;
>
> (c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and
>
> (d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

Indeed, the regulations expressly provided that "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could opt to comply with FMVSS 208 by installing passive seat belts that met the performance requirements of any of the three restraint system design options with no manually-activated seat belts at all.

B. Factual and Procedural Background

Petitioner Erin Dykema was seriously injured in April 1988 when the 1978 Volkswagen Rabbit she was driving left the road and rolled over. Petitioner was thrown from the car and rendered a quadriplegic. No other vehicles were involved in the accident. Pet. App. 3. The Volkswagen Rabbit "was equipped with a passive-restraint system that featured a two-point body restraint, a knee bar, and a ramped seat. The system, known as the VWRA, was automatically engaged when drivers positioned themselves in the seat." *Ibid.*

Petitioner filed suit in the Circuit Court for Milwaukee County, Wisconsin, asserting common law negligence and strict product liability claims against Volkswagen. Pet. App. 2. Petitioner urged that the 1978 Volkswagen Rabbit was defectively designed and that Volkswagen was negligent with respect to the design of the vehicle's safety restraint system because it should have had a manually-activated lap belt. Pet. 9.

Following the presentation of petitioner's case-in-chief, Volkswagen moved to dismiss petitioner's claims. Volkswagen contended that the passive restraint system in the Rabbit fully met the requirements for the second safety design option in FMVSS 208, that petitioner's claims sought to

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See also 49 C.F.R. § 571.208, S4.5.3.

impose a state common law standard inconsistent with the federal safety standard, and that those claims accordingly were expressly and impliedly preempted by the Safety Act. Although the Circuit Court agreed with Volkswagen — and petitioner did not dispute — that the VWRA system complied with FMVSS 208 (Pet. App. 20), it nonetheless denied VW's motion.

The trial court found no express preemption because the preemption section of the Act, 15 U.S.C. § 1392(d), refers to "conflicting [state law] standards" and, in the court's view, "[s]tandards are not imposed by verdicts in tort actions." Pet. App. 21; see *ibid.* (the language in Section 1392(d) "does not relate to common law actions but to state statutes and regulations"). The trial court believed that its interpretation was "consistent with and justifies the existence of the savings clause section 1397(c) [*sic*]." Pet. App. 21. As for implied preemption, the court found no conflict between petitioner's claims and FMVSS 208. "The addition of a lap belt or other type of torso restraint wouldn't conflict with the Federal Standards, but would supplement them." Pet. App. 23.

After the denial of Volkswagen's motion, the trial continued. Following eight weeks of testimony, including the testimony of numerous expert witnesses presented by both petitioner and respondents, the jury returned a verdict for Volkswagen. Pet. App. 23. In its special verdict, the jury found that Volkswagen was "not negligent and that the subject Volkswagen vehicle was not defective and unreasonably dangerous; and that [petitioner], Erin Dykema, was negligent and that such negligence constituted 100% of the causal negligence producing her injuries." *Id.* at 25.

On motions after the verdict, petitioner alleged that the jurors engaged in misconduct. The trial court held an evidentiary hearing and, thereafter, denied her motion for a

new trial. The court entered an order dismissing petitioner's complaint "on the merits." *Id.* at 26.

Petitioner then appealed and, as a consequence, Volkswagen cross-appealed. Petitioner presented only one issue for review on appeal, arguing that she was entitled to a new trial because of alleged jury misconduct. Pet. App. 2. In its cross-appeal, VW argued that the trial court erred in failing to dismiss petitioner's claims as preempted by the Safety Act. *Ibid.*

C. The Wisconsin Court of Appeals' Decision

The Wisconsin Court of Appeals reversed the denial of VW's motion to dismiss and affirmed the judgment in VW's favor. The Court of Appeals agreed with Volkswagen that petitioner's tort claims were preempted by the Safety Act and FMVSS 208. Pet. App. 2-4. Because of its preemption holding, the Court of Appeals did not address petitioner's alleged jury misconduct issue. *Ibid.*

The Court of Appeals' preemption analysis relied heavily on its prior decision in *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865, 867, rev. denied, 510 N.W.2d 137 (Wis. 1993), which held that the Safety Act "preempts state law claims based on the absence of airbags or other types of restraints." The *Boyle* court found that the Safety Act both expressly ("explicit preemption," *id.* at 869-870) and impliedly ("implicit preemption," *id.* at 870-871) preempted such common law claims.

After noting petitioner's concession that the 1978 Volkswagen Rabbit complied fully with FMVSS 208,[3] the

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[3] "Throughout the pretrial motions, the trial, and on appeal, Dykema has never argued that the VWRA system did not comply with the requirements of FMVSS 208. Indeed, at oral argument, Dykema stated that she did not dispute the fact that the VWRA complied with the standard." Pet. App. 6.

Court of Appeals concluded that its "holding in *Boyle* controls the disposition of this case." Pet. App. 7. Petitioner's "claims, which were based upon VW's alleged failure to provide reasonable adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle* specifically states that such claims are preempted." Pet. at 8. "Accordingly, we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action." Pet. App. 8.

Following the decision of the Court of Appeals, petitioner sought discretionary review of the express *and* implied preemption issues in the Supreme Court of Wisconsin, which was denied. *Id.* at 29-39. Petitioner did not seek review of the jury misconduct issue.

REASONS FOR DENYING THE PETITION

Petitioner seeks review by this Court of a narrow issue of *express* preemption under the Safety Act. Specifically, petitioner contends that the Safety Act does not expressly preempt her common law tort claims against Volkswagen, even though those common law claims address an aspect of restraint system design in a manner flatly inconsistent with FMVSS 208.

There is no reason for the Court to concern itself with the express preemption issue in this case because the Wisconsin Court of Appeals held that petitioners claims were both expressly *and impliedly* preempted by the Safety Act. Remarkably, the petition does not even raise the implied preemption issue. This case does not merit further review because *every* federal court of appeals to address the issue has found that FMVSS 208 impliedly preempts inconsistent common law claims. Moreover, even if this Court were to disagree with the court below on both express and implied preemption, petitioner still would not prevail in this case because the jury rejected her tort claims on the merits,

finding that her car was not defectively designed and that she, in fact, was causally responsible for her injuries.

Petitioner has thus contrived a narrow question of express preemption that is wholly academic to the ultimate disposition of this case. Even on this limited question, review is not warranted because the decision below is plainly correct, and petitioner's claim of a conflict among the lower courts relies almost entirely on decisions that predate this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

A. Waiver

To begin with, this case is not an appropriate vehicle for the Court to address the question whether the Safety Act expressly preempts inconsistent state common law standards. It is procedurally flawed because petitioner will not prevail on her tort claims even if this Court grants review and reverses the Court of Appeals' decision in favor of Volkswagen.

After a lengthy trial with expert testimony proffered by both petitioner and respondent, petitioner lost on the merits of her claims that the safety restraint system in respondent's automobile was defectively designed and that Volkswagen was negligent. "At the conclusion of the eight-week trial, the jury found that the 1978 Volkswagen Rabbit was not defectively designed and that VW was not negligent." Pet. App. 4. The jury also found that petitioner's own negligence had caused her injuries. Pet. 25.

Petitioner's sole argument in the Court of appeals was based on allegations of jury misconduct. Pet. App. 2-3. Petitioner did not raise this issue in her petition for review filed with the Wisconsin Supreme Court. The Wisconsin Rules of Appellate Procedure required petitioner to set forth every issue for which review was sought or risk waiver. Wis. Stat. § 809.62(b) ("If the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the Supreme Court"); see

In Interest of Jamie L., 493 N.W.2d 56 (Wis. 1992); *State* v. *Johnson*, 449 N.W.2d 854 (Wis. 1990). It is therefore at least an open question, not yet decided by the Wisconsin Supreme Court, whether petitioner has waived her right to continue to litigate the jury misconduct claim.

Thus, even if petitioner prevails in this Court on the preemption issue, she cannot prevail on the merits of her tort claims without winning both the jury misconduct issue in the Court of Appeals, which she may well have abandoned, *and* a favorable verdict at a subsequent new trial. This Court is loathe to expend valuable judicial resources to resolve an issue that is not likely to affect the ultimate outcome of a case. See *Sommerville* v. *United States*, 376 U.S. 909 (1964).

B. Implied Preemption

The petition is fatally flawed for another reason, because it is premised on a fundamental misreading of the Court of Appeals' holding as limited strictly to express preemption. See Pet. 27. Petitioner suggests that, as a result of this limited holding, the case presents only the express preemption issues left unresolved in *Freightliner Corp* v. *Myrick*, 115 S. Ct. 1483 (1995). See Pet. 13.

Unfortunately for petitioner, the Court of Appeals' decision was clearly not limited to express preemption. The court below also decided the implied preemption issue, which is independently dispositive of petitioner's claims.

It is beyond dispute that the trial court ruled on both the express and implied preemption arguments raised by Volkswagen. Pet. App. 20-23. It is equally undisputed that Volkswagen and petitioner extensively briefed and argued the issues of express *and* implied preemption to the Court of Appeals and discussed them in light of that court's prior decision in *Boyle*. See Brief of Defendants-Cross Appellants 26-50; Brief of Plaintiff-Cross Respondent 19-49; Defendants-

Respondents-Cross-Appellants' Reply Brief 7-14; Supplemental Memorandum of Law on Defendants' Cross Appeal Filed Pursuant to the Court's Order Dated August 3, 1994; Plaintiff's Supplemental Memorandum on Defendants' Cross Appeal. Indeed, the two primary headings of Volkswagen's reply brief in the Court of Appeals read (at 7, 10): "Following *Boyle*, Cross-Respondent's Claims Are Expressly Preempted" and "Following *Boyle*, Cross-Respondent's Claims Are Impliedly Preempted."

The Court of Appeals concluded that the express and implied preemption claims were resolved by its decision in *Boyle*: "our holding in *Boyle* controls the disposition of this case." Pet. App. 7; see *id.* at 8 ("we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action"). And *Boyle* was plainly decided on both express and implied preemption grounds (501 N.W.2d at 871):

> In summary, the Federal Motor Vehicle Safety Act explicitly preempts Boyle's lack of passive restraints claims because that claim conflicts with the federal Act's statutory scheme. As an alternative ground for our holding, even if it were determined that the federal Act does not explicitly preempt the portion of Boyles' claim based on the absence of passive restraints, that portion of her claim is implicitly preempted because it conflicts with Congress' intent manifested in the explicit preemption provision.

Indeed, petitioner admits that *Boyle* was decided on both express and implied preemption grounds. Pet. 12.

In sum, the decision below — which adopts unequivocally the "holding and analysis" of *Boyle* (Pet. App. 8) — is based on express *and implied* preemption. There is no hint in the Court of Appeals' opinion that its holding in this case, unlike the holding in *Boyle*, was somehow limited to express preemption.

Contrary to petitioner's suggestion, therefore, she can prevail in this Court only if the Court decides the issue of implied preemption under the Safety Act. And that question does not merit review for a number of reasons. Most important, the Question Presented in the petition raises only the issue of express preemption (Pet. i), and the body of the petition nowhere argues the implied preemption point. Under longstanding practice, the implied preemption issue has been waived because this Court will consider "[o]nly the questions set forth in petition" (S. Ct. R. 14.1). See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 623 (1974); *Irvine* v. *California*, 347 U.S. 128, 129-130 (1954).

In any event, even if it were properly presented, the implied preemption issue would not warrant further consideration because there is no conflict in the lower courts. Every federal court of appeals to address the issue has concluded that tort claims such as petitioner's, premised on a motor vehicle manufacturer's exercise of a FMVSS 208 safety design option, are impliedly preempted under the Safety Act.[4] Indeed, petitioner conveniently obscures the

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[4] See *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). Several state appellate courts have reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

fact that the court of appeals decisions she cites (Pet. 18-19) to establish a conflict on express preemption uniformly conclude that common law claims such as hers are impliedly preempted.

Under these precedents, the Wisconsin Court of Appeals' implied preemption ruling was plainly correct. At the time respondent's automobile was manufactured, FMVSS 208 gave Volkswagen the *design option* to install fully passive, automatic two-point safety belts with no manually-activated lap belts. As the Solicitor General explained in his *amicus curiae* brief in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065 (1990), the Secretary of Transportation sought to "promote motor vehicle safety" through FMVSS 208 by "affirmatively * * * encourag[ing] manufacturers to use a *variety* of protection systems in their fleets." U.S. Br. 12, 15 (emphasis in original). Such diversity was intended to "ensur[e] public acceptance of passive protection systems," "encourag[e] the development of new and improved technologies," and "enabl[e] [NHTSA] to acquire a more extensive data base upon which future regulatory decisions could be made." *Id.* at 12-13. In sum, FMVSS 208 was consciously designed to give manufacturers a choice among various passive restraint systems, rather than to mandate one particular system. See pages 2-5, *supra*. Any state law that removes or restricts a design option granted by federal law conflicts with federal law and is preempted. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982).

Here, as both the trial judge and the Wisconsin Court of Appeals found, Volkswagen complied fully with FMVSS 208 by invoking option two, which authorized passive safety restraints without a manual lap belt. See Pet. App. 6, 20; see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). In fact, in 1974 NHTSA expressly determined that

Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manual seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834 (1974). Since then, a long line of Secretaries of Transportation has approved (and lauded) the use of the automatic seat belt in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).[5] Certainly it would frustrate the purposes of FMVSS 208 if state common law could make the use of this restraint system tortious.

Thus, for petitioner to prevail, this Court would be required to address not only the express preemption issue, but also the implied preemption defense interposed by Volkswagen — an issue that is *not* included in the question presented, *not* discussed on the merits in the petition, and *not*, in any event, the subject of any conflict in the appellate courts.

C. Express Preemption

Procedural problems aside, petitioner's express preemption argument does not merit review. Contrary to petitioner's assertion (Pet. 15), there is not in fact any actual conflict between the Court of Appeals' decision on express preemption and "the decisions of every federal court of appeals which has considered the issue."[6] Virtually all of the

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[5] In early 1977, the Department of Transportation contracted with Volkswagen to manufacture 125,000 cars equipped with the system in a "demonstration program to exhibit the effectiveness of passive restraint systems." 42 Fed. Reg. 5071, 5071 (1977).

[6] Petitioner also claims that there is a conflict between the decision below and the Court of Appeals' decision in another Safety

appellate cases cited by petitioner were decided before this Court's decision in *Cipollone*, which eliminated any doubt about whether the safety "standards" referred to in the preemption provision of the Safety Act, 15 U.S.C. § 1392(d), include common law standards.[7] Petitioner's argument to the contrary (Pet. 21-22) cannot stand in light of this decision.

The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer to common law claims. See also *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737-1738 (1993). The Court's holding was premised on its long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247

Act preemption case, *Derby* v. *Brenner Tank, Inc.*, 522 N.W.2d 274, rev. denied, 527 N.W.2d 335 (Wis. 1994). Even if there were a conflict between these decisions (and there is not in light of the fact that *Derby* involves FMVSS 108), that would be a matter of concern only to the Wisconsin Supreme Court, which has denied review in both cases. It is not an issue of national importance meriting review by this Court.

[7] Many of the federal district court and state court decisions cited by petitioner were likewise decided before *Cipollone*. And many of the post-*Cipollone* decisions finding no preemption were influenced by the Eleventh Circuit's erroneous decision on implied preemption under the Safety Act, which was reversed by this Court in *Myrick*. Finally, as petitioner concedes (Pet. 21), a number of federal district courts and state courts have found express preemption under the Safety Act.

(1959)). See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress").

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law," "requirements" or "standards" necessarily includes claims based on state common law.[8] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136, *et seq.*,[9] the

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[8] See *Taylor AG Indus.* v. *Pure-Gro*, 1995 U.S. App. LEXIS 9150 *14 (9th Cir. Apr. 24, 1995); *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, 38 F.3d 988, 991 (8th Cir. 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 115 S. Ct. 429 (1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

[9] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F.

Federal Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[10] the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*,[11] and the Federal Boat Safety Act, 46 U.S.C.

Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

[10] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App.), cert. denied, 115 S. Ct. 1315 (1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[11] See, *e.g.*, *Michael* v. *Shiley, Inc.*, 46 F.3d 1316, 1320 (3d Cir. 1995); *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King* v. *Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Richman* v. *W.L. Gore & Assoc., Inc.*, 881 F. Supp. 895 (S.D.N.Y. 1995); *Bokis* v. *American Medical Sys., Inc.*, 875 F. Supp. 748, 751 (W.D. Ok. 1995); *Mitchell* v. *Collagen Corp.*, 870 F. Supp. 885, 887 (N.D. Ind. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994);

§§ 4301, *et seq.*[12] There is every reason to believe that the courts that rejected express preemption claims prior to *Cipollone* would reconsider those rulings in light of this overwhelming authority. In *Papas*, *supra*, for example, the Eleventh Circuit reconsidered its holding on the preemptive scope of FIFRA in light of *Cipollone* and found express preemption of common law claims. The court concluded that the express preemption of state law "requirements," included "state regulation[s]" and common law damages actions. 985 F.2d at 518; see also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

In urging this Court to review the express preemption issue in this case, petitioner also relies (Pet. 13-19) on cases interpreting the Safety Act's so-called "savings" clause, 15 U.S.C. 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law").

Kemp v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[12] See, *e.g.*, *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

Petitioner maintains that this clause shelters all common law claims from preemption.[13]

The text, structure, and legislative history of Section 1397(k) demonstrate, however, that it was not intended by Congress to restrict the scope of express preemption. Instead, the narrow language of Section 1397(k), which states that "compliance with any Federal motor vehicle safety standard * * * does not exempt any person from any liability under common law," by its terms negates only an affirmative common law defense of compliance with a government standard. Significantly, the clause does not refer to preemption or to the limits of federal supremacy; indeed, as the Safety Act was originally drafted, it was not even included in the part of the Act, Section 1392(d), that addresses federal preemption.[14]

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[13] The statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. The mere presence of a so-called savings clause in the Safety Act cannot be dispositive on the issue of federal preemption, however, because this Court found express preemption of common law claims in *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1736-1737 (1993), and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[14] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were appropriately placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Significantly, however, Section 1392(d) was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. 103-272, § 1(e), 108 Stat. 943.

Moreover, the text of Section 1397(k) differs significantly from the language employed by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of federal preemption. In the preemption section of the Safety Act (Section 1392(d)), for example, Congress included two true savings clauses restricting the scope of preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphases added). This is the all-encompassing phraseology that Congress had traditionally used in a savings clause, rather than the narrow "compliance with" language of Section 1397(k). See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993); *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992).

Perhaps more important, the structure of the Safety Act shows that Section 1397(k) was not intended by Congress to be a sweeping exception to Section 1392(d). Section 1397(k) appears in a wholly separate section of the Act from Section 1392(d), which refers expressly to preemption and which contains two explicit savings clauses. Certainly, if Congress had intended Section 1397(k) to be an expansive third exception to the preemption provision in Section 1392(d), it would have included the language of Section 1397(k) alongside the other two express savings clauses in Section 1392(d).

This Court has noted the interpretive significance of the location of a savings clause in relation to the preemptive language of a statute. In *Easterwood*, the Court observed that the preemption section of the statute at issue contained "express saving and pre-emption clauses." 113 S. Ct. at 1736. The Court emphasized that the preemption section was "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 1738. In this case, by contrast, the Safety Act has no such solicitude for state law. Section 1392(d) is neither prefaced nor succeeded by an express savings clause for common law actions.

Finally, the legislative history of the Safety Act is further evidence that Section 1397(k) was not intended to carve a gaping hole in the preemption provision. Both the House and Conference Reports contain sections entitled "Preemption," but neither section discusses Section 1397(k). See H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966); H.R. Conf. Rep. No. 1776, *supra*, at 17. The House Report mentions Section 1397(k) under the heading "Prohibited Acts and Exemption," and the Conference Report does not deal with it at all. Again, if Congress had intended Section 1397(k) to be a sweeping exception to the preemption provision, it surely would have described it as such in these reports. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991). Rather, as its language indicates, Section 1397(k) was added merely to clarify that the Safety Act did not create an affirmative defense of compliance with government standards — or, as we next show, that the Safety Act was not intended to occupy the entire field of motor vehicle safety. In this case, Volkswagen never argued that compliance with FMVSS 208 was an affirmative defense.

Even if it were viewed as a limitation on the Safety Act's broad preemption provision, Section 1397(k) indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could continue to

be brought in areas not covered by a federal Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these pronouncements. See, *e.g.*, *Morales*, 112 S. Ct. at 2037;

International Paper Co. v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 1397(k) may have been added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by and not inconsistent with those federal standards.

This case is a good example: FMVSS 208 expressly grants, for safety reasons (see pages 2-5, *supra*), a choice of several types of safety restraint designs for automobiles. Section 1397(k) would thereby preserve a common law claim that a restraint system in a vehicle was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Federal Motor Vehicle Safety Standard. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted option to utilize a passive restraint system design approved by the federal safety agency, NHTSA. Such a lawsuit is plainly inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety, by the Department of Transportation. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992).

D. Summary

In the final analysis, the court below correctly decided the express preemption issue. That issue, however, was not dispositive of the preemption claim asserted by Volkswagen; as discussed above, the Court of Appeals also held that petitioner's claims were impliedly preempted. Yet petitioner has not raised the implied preemption issue, and that issue does not in any event warrant review by this Court. Finally,

even if the implied preemption issue were properly presented and petitioner prevailed on that issue, she still would not prevail on the merits of her common law claims because of the jury's verdict. In sum, the petition clearly does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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